MOTION FILED

FEB 17 1998

(3)

No. 97-998

IN THE
# Supreme Court of the United States

October Term, 1997

United States *ex rel.* Stanley Rabushka
and Stanley Rabushka,

Petitioners,

v.

Crane Co.,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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8 pp

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## MOTION OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37, Taxpayers Against Fraud, The False Claims Act Legal Center (TAF) sought consent of all parties to file a brief as *amicus curiae* supporting Stanley Rabushka's Petition for a Writ of *Certiorari*. Rabushka consented; Crane Co. withheld consent. Thus, TAF seeks leave to file the accompanying brief.[1]

[1] The following information is furnished to comply with Rule 37.6. Counsel for TAF authored this motion and the accompanying brief. No person or entity other than TAF made a monetary contribution to the

## INTEREST OF *AMICUS CURIAE*

TAF is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the federal False Claims Act (FCA or Act). TAF's mission is both activist and educational. Established in 1986, TAF serves to: (1) collect and evaluate evidence of fraud against the Federal Government, and facilitate the filing of meritorious False Claims Act *qui tam* suits; (2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to prosecute *qui tam* suits effectively; (3) inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions; and (4) advance public, legislative, and government support for *qui tam*.

TAF is currently based in Washington, D.C. with a staff of nine full-time employees, including six attorneys. TAF works with a network of more than 200 attorneys nationwide who represent *qui tam* plaintiffs in FCA litigation. In the past few years, TAF has greatly expanded its efforts toward public awareness and education regarding the FCA.

TAF publishes the *False Claims Act and Qui Tam Quarterly Review*, a quarterly publication which provides an overview of case decisions, settlements, and other developments under the Act. The publication is distributed free of charge to more than 1400 recipients, including all federal circuit courts of appeal.

TAF collects and disseminates information concerning the False Claims Act and *qui tam*. TAF regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and government officials. TAF maintains a comprehensive False Claims Act

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preparation or submission of this motion or the accompanying brief.

library open to the public, and TAF has an educational presence on the Global Internet. TAF also has provided congressional testimony, participated in conference presentations, and assisted with training programs.

Over the last decade, TAF has supported numerous FCA cases throughout the country, including a number of suits that have each returned over fifty million dollars to the United States Treasury. TAF is presently involved in several *qui tam* suits that potentially will return millions of dollars to the U.S. Treasury. The funds TAF recovers from successful cases are continually reinvested to develop and support future *qui tam* actions and to fund TAF's educational activities.

TAF has filed *amicus* briefs on important legal and policy issues in FCA cases before numerous federal courts, including this Court. TAF possesses extensive knowledge about the origin and purposes of the False Claims Act Amendments of 1986 and experience with its implementation. As such, its brief will assist the Court's consideration of Stanley Rabushka's Petition for a Writ of *Certiorari*.

## THIS MOTION IS TIMELY SUBMITTED

This brief is timely submitted as the deadline for the filing of a brief in opposition to Rabushka's Petition for a Writ of *Certiorari* is February 17, 1998.

## CONCLUSION

For these reasons, TAF respectfully requests that this motion be granted and that the Clerk be directed to file the

brief being submitted herewith.

Respectfully submitted,

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## *AMICUS CURIAE* BRIEF OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

## SUMMARY OF ARGUMENT

Congress legislated an overhaul of the False Claims Act (FCA or Act) in 1986 to enhance the Federal Government's ability to recover losses sustained as a result of fraud. The breadth of situations in which the Act has potential applicability is as wide as the types of programs for which the Government provides financial support. As the FCA is a legal tool to fight fraud against the Federal Government, and the Government acts through its employees and agents, those

employees and agents may be called upon to play a role in FCA litigation as they were in this case.

Use of a government employee as a witness or information source in FCA litigation, however, must be approached with caution. While the government employee or agent may be in a good position to know the details about the facts underlying an FCA case, he or she may lack objectivity because true candor might reflect poorly on his or her job performance or stewardship of government resources. Consistently more reliable and objective sources of information for FCA litigation are legal and regulatory requirements that agencies must follow.

Taxpayers Against Fraud, The False Claims Act Legal Center (TAF) submits this *amicus* brief to assist the Court's understanding of the significance and wide-ranging implications of Stanley Rabushka's Petition for a Writ of *Certiorari*. Thus, TAF's brief provides background of and context for the False Claims Act, and then discusses why it is of great importance for this Court to determine the most appropriate role for legal and regulatory standards and for government employees and agents to play in FCA litigation.

## ARGUMENT

### I. The Amended False Claims Act Is the Government's Primary Litigative Tool Against Fraud.

The 1986 FCA Amendments were the legislative response to what Congress concluded was a "severe" problem -- that is, the "growing pervasiveness of fraud" in Federal programs and procurement. S. REP. NO. 345, 99th Cong., 1st Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266

(S. REP.).[1] The purpose of the reform was to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government" by modernizing the "Government's primary litigative tool for combatting fraud." S. REP. at 1, 2, *reprinted in* 1986 U.S.C.C.A.N. 5266.

As an integral part of this modernization, Congress revitalized the False Claims Act's *qui tam* provisions because it believed that "only a coordinated effort of both the government and the citizenry will decrease this wave of defrauding public funds." S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Among other things, its explicit intent was "to encourage more private enforcement suits" under the Act. S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89. As the False Claims Act addresses fraud against the Federal Government, it potentially comes into play whenever a false or fraudulent claim for payment or approval is submitted by an entity seeking federal funds. Amending the FCA to enlist the help of the public in this vital endeavor has already had a tremendous impact.

According to the Justice Department, over $1.831 billion has been recovered under the *qui tam* provisions of the amended Act through fiscal year 1997.[2] Over 2,000 *qui tam*

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[1] Congress cited with alarm U.S. Department of Justice (DOJ or Justice Department) estimates that fraud was draining up to 10 percent of the entire Federal budget. S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268; *accord* H.R. REP. No. 660, 99th Cong., 2d Sess. 18 (1986) ("Evidence of fraud in Government programs and procurement is on a steady rise.").

[2] Information confirmed by Joseph C. Krovisky, Public Information Officer, Office of Public Affairs, U.S. Department of Justice on February 4, 1998. The Justice Department has not released equivalent statistics regarding total recoveries (non-*qui tam* as well as *qui tam*) under the amended Act. However, in a letter to Senator Charles Grassley dated July 23, 1996, DOJ indicated that, since the 1986 FCA amendments, total

cases have been filed during that same time period. In fiscal year 1997 alone, 530 *qui tam* cases were filed and more than $625 million was recovered.

Since enactment of the 1986 Amendments, the character of FCA litigation has evolved from primarily targeting false claims submitted by defense contractors to enforcing accountability in a broad variety of federal programs. Whereas 68% of *qui tam* recoveries during the first decade after the Amendments was attributable to Defense Department fraud, 54% of *qui tam* cases filed in FY 1997 involved the Department of Health and Human Services as the client agency. *Id.* This shift has been gradual, but steady. Since 1986, the Act has recovered hundreds of millions of dollars illegally diverted from health care programs like Medicare, Medicaid, and CHAMPUS, social services programs for children, government-sponsored scientific research grants, transportation safety initiatives, housing and urban development programs, and other important federal endeavors including defense.

The Act has also been effective in prosecuting a broad variety of means for committing fraud. It has successfully targeted double billing, product substitution, unnecessary services or services not performed, cost shifting, false testing, noncompliance with statutes, regulations, or contract terms, inadequate quality of care, kickbacks, and other methods of deceit.

The FCA is expected to continue to have salutary effects in the fight against fraud into the future. According to the analysis contained in a recent economic study, *qui tam* recoveries under the FCA can be expected to equal between

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civil fraud recoveries equaled $3.43 billion at that time. This letter has been lodged with the Clerk of the Court.

about $6.9 billion and $9.3 billion over the next ten years.[3] Further, deterrence of fraud due to the Act's *qui tam* provisions can be expected to range from between $105.1 billion and $210.1 billion over the period 1996 to 2006. *Id.*

**II. The Issue of the Appropriate Role for Government Employees or Agents to Play in FCA Litigation Is Central to the Proper Application of the Act.**

The very nature of FCA litigation combined with the fact that the Government must act through employees and agents lead to the conclusion that the question of what is the appropriate role for government employees and agents to play in FCA litigation is a central one. Also, the fact that FCA litigation has been filed necessarily means that there has been at least an *accusation* of wrongdoing in connection with a government program. Prominent among those individuals with information about the alleged illegality are the Government's employees and agents.

As in the *Rabushka* litigation, courts are usually faced with the option of relying on the testimony of government employees and agents for information about the allegations. The Eighth Circuit seized that option and concluded, based on the deposition testimony of the agency's former principal deputy executive and chief negotiator, that "the PBGC would not have terminated CF&I's plan in 1985." Rabushka's Petition for a Writ of *Certiorari* at A-11. It was on the basis of that former government employee's testimony that the Eighth Circuit affirmed the lower court's granting of summary judgment. In doing so, the appellate court ignored the more objective evidence contained in the law and the agency's

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[3] William L. Stringer, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT (Sept. 1996) (An Economic Study Commissioned by Taxpayers Against Fraud, The False Claims Act Legal Center). This material has been lodged with the Clerk of the Court.

regulations.

Government employees and agents cannot be expected to be objective witnesses when testifying in the context of litigation resulting from their decisions during their government employment. Their reputations and, if they are still employed by the Government, their job security may be in jeopardy if their behavior or failure to act is viewed as enabling or contributing to alleged illegality. At best, the government employee or agent may be viewed as incompetent; or worse, he or she may be seen as dishonest or involved in the alleged violation.

Given these realities, therefore, it would be imprudent to expect the input of a government employee or agent in FCA litigation to constitute objective information. Instead, it is more reasonable to expect that information from a government employee or agent in litigation under the Act would be, at best, subjective and, even possibly, self-serving. More objective information to help resolve FCA litigation would come from the laws and regulations applicable to the practices of the federal agency in question.

Because the issue of the proper role for government employees and agents to play is more likely than not to arise in FCA litigation, it is an issue central to the proper application of the Act. By granting *certiorari* to the Eighth Circuit's decision in this case, the Court could resolve this pivotal matter.

## CONCLUSION

For these reasons, TAF urges the Court to grant Rabushka's Petition for a Writ of *Certiorari*.

Respectfully submitted,

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